IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 805 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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SHINGABHAI NANABHAI PARMAR - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :
MR G RAMAKRISHNAN for Appellant(s) for Appellant(s) : 1,
MR HL JANI, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 03/07/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Sec.374 of the Code of Criminal Procedure has been filed by the appellant-original accused against the judgment and order of conviction dated 5-8-1998 delivered by the learned Sessions Judge, Banaskantha at Palanpur in Sessions Case No.44 of 1998 sentencing the appellant to undergo rigorous imprisonment for life and to pay fine of Rs.500/- and in default of payment of fine, to suffer rigorous imprisonment for three months for the offence under Sec.302 of IPC.

2. Before proceeding with the matter, it is required to be noted that as informed by learned APP, the present appellant has been released on temporary bail on 2-7-2004 for a period of 15 days. He has to surrender before the jail authorities on 1-7-2004 but has chosen not to surrender and remained absconding till date. Inspite of putting in necessary efforts, the accused could not be traced out by the concerned authorities as is reflected from the jail record produced by learned APP, which is forming part of the record. Hence, with consent of the learned counsel appearing for the appellant, we have proceeded with final hearing of the matter as

it is of the year 1998.

3. The prosecution case in short is that yearly festival of tribals falls in the month of December wherein all the members of tribal families used to gather and go to forest for catching a colourful sparrow (*devchikli*) alive and thereafter would move with youths to each house of the village for collecting food articles such as wheat, jaggery, oil, ghee, money etc. to prepare festival food in the same evening. On the eve of said festival of the year 1997 on 29-12-1997, deceased, accused and other youths first went to forest and caught a live colourful sparrow and started procession under the leadership of the deceased for collecting food materials and money. As leadership had been taken by the deceased, it was not liked by the accused and hence, some altercation had taken place between the appellant and the deceased. Due to intervention of others, festival could be celebrated smoothly and in the evening, all villagers viz., men, women, youths and children gathered in front of the house of Sada Kala Solanki where they prepared 5-6 camp fires and put the wheat materials there for the purpose of preparing bati. As it was winter time, same have been used for protecting themselves from severe cold

weather. While preparing food, they were enjoying in a group. A that time, at about 22-23 hours, when the deceased was sitting in front of open fire, accused armed with axe came there and gave blows with it on the left neck and backside of neck of the deceased and thereafter ran away with axe. As the victim suffered grievous injuries, he fell down there itself. At that time, his father, other family members and villagers sitting there took the victim to Ambaji hospital. Since doctor was not available there, they started towards Danta for treatment. Meanwhile, complainant and some persons went to Ambaji Police Station while others, who stayed there took the injured to Danta hospital and on reaching there, the doctor on examination declared him dead. Meanwhile, complaint to that effect was registered against the appellant as Ambaji Police Station I.C.R.No.137 of 1997 for the offence punishable under Sections 302 and 504 of IPC and after registering the offence, investigation has been handed over by PSO to 2nd PSI, Mr.Prajapati. After taking over investigation, PSI, Mr.Prajapati sent yadi to Executive Magistrate, Danta for inquest panchnama. After preparing inquest panchnama in presence of panchas and after filling in

Marnotar form, yadi was sent to Community Health Centre, Danta, for performing post mortem and post mortem was performed by the doctor. Meanwhile, I.O. went to the scene of offence, prepared panchnama of scene of offence and also seized muddamal found there. He also recorded statements of various witnesses and tried to search the accused. The accused was arrested on 1-1-19898 and after completion of all formalities, he was sent to judicial custody. Thereafter, the accused showed willingness to produce the muddamal used in the crime in question and, therefore, panchas were called and muddamal axe as shown by the accused was attached in presence of panchas under Sec.27 of the Indian Evidence Act. He also sent muddamal to FSL along with forwarding letter and collected medical evidence including post mortem note and FSL report and kept them in investigation file. At the end of investigation, charge sheet was submitted into the Court of learned J.M.F.C., Danta.

4.As the case against the accused was triable exclusively by the Court of Sessions, learned Judicial Magistrate (First Class), Danta, committed the case to the Court of Sessions, Banaskantha at Palanpur, for trial where it was numbered as Sessions Case No.44 of 1998.

On production of the accused, the learned Sessions Judge framed charge against the accused. The charge was read over and explained to the accused. Accused pleaded not guilty to the said charge and prayed for trial.

5.To prove the charge against the accused, the prosecution examined following witnesses:

1)Dr.Akhilesh Giriraj Mishra, P.W.1, Ex.9, the doctor who performed postmortem on the dead body of the deceased.

2)Bhanabhai Fulabhai, the complainant, P.W.2, Ex.14.

3)Kalabhai Bhemabhai, P.W.3, Ex.17.

4)Panriben Bhanabhai, P.W.4, Ex.18, the sister of the deceased.

5)Sadabhai Kalabhai, P.W.5, Ex.19.

6)Nathabhai Kalabhai, P.W.6, Ex.20.

7)Limbabhai Fulabhai, P.W.7, Ex.21.

8)Punabhai Bhanabhai, P.W.8, Ex.22.

9)Amrabhai Sonabhai, P.W.9, Ex.23.

10)Bhemaji Kaluji, P.W.10, Ex.25.

11)Mahendrasinh Ratnasinh Chavda, P.W.11, Ex.37

The prosecution also relied on various documentary evidence namely, post mortem note Ex.12, certificate for cause of death, Ex.13, inquest panchnama Ex.15, panchnama of cloth of Vagabhai Bhanabhai Ex.16, panchnama of

scene of offence Ex.24, complaint Ex.26, suchipatra Ex.27, yadi to PSI, Ambaji Police Station Ex.31, letter to PSI, Ambaji Police Station Ex.32, FSL report Ex.33, map of scene of offence Ex.36, panchnama of body of accused Ex.39, panchnama of weapon Ex.40, FSL letter to PSI, Ambaji Police Station Ex.43, etc. On submission of closing pursis by the prosecution, learned Sessions Judge recorded further statement of the accused under Sec.313 of the Code of Criminal Procedure qua incriminating question.

6. After hearing the learned counsel appearing for the respective parties, the learned Sessions Judge, Banaskantha at Palanpur, vide impugned judgment and order convicted the appellant-accused for life giving rise for the appellant-original accused to prefer the present Criminal Appeal.

7. We have heard learned counsel for the appellant, Mr.G.Ramakrishnan and learned APP for the State, Mr.H.L.Jani. Also gone through the oral as well as documentary evidence shown to us by the learned counsel for the respective parties together with the reasoned judgment delivered by the court below.

8. It is mainly argued by the learned counsel for the appellant that though there are number of eye witnesses, few are interested

ones as they are the nearest relatives of the deceased. Others have not supported the case of the prosecution in toto. Even prosecution has failed to establish the motive. Though there is a discovery panchnama, it is not a panchnama under Sec.27 of the Indian Evidence Act as the place from where the muddamal was discovered was accessible to all concerned and hence, said panchnama ought not to have been relied on by the court below. In absence of any independent witness and also in view of the facts coming out from the cross examination of the witnesses, it is a fit case wherein benefit of doubt is required to be given to the accused. Merely because the appellant was present at the place of incident, he cannot be falsely involved into the serious offence under Sec.302 of IPC. It is therefore prayed that the impugned judgment and order may be quashed and set aside and the appellant may be set at liberty forthwith by allowing this appeal.

9. Learned APP for the State, Mr.Jani, has also taken us through the oral evidence of all eye witnesses including the complainant, discovery panchnama, panchnama of scene of offence along with reasoned judgment and argued that it is a fit case wherein prosecution is able to prove the case against

the appellant beyond reasonable doubt. Merely witnesses are relatives of the deceased, their evidence cannot be discarded. If Court wants to rely upon the evidence of witnesses who are relatives, Court should evaluate their evidence to find out the truth and if found satisfactory and trustworthy, then reliance can be placed on them. He has relied upon judgment of the Apex Court reported in AIR 2006 S.C. p.3010 in the case of Pulicheria Nagaraju alias Nagaraja Reddy Vs. State of Andhra Pradesh more particularly para 11 wherein it has been observed by the Apex Court as under:

> “Evidence of witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted. In the instant case nothing had been elicited in the cross-examination of eye-witnesses to discredit their evidence. Heir evidence finds corroboration in complaint and the evidence of the Doctors and the Mos

> seized on the disclosures made by the accused. Therefore, the evidence of said eye-witnesses could not be rejected, even though they were closely related to the deceased and inimically disposed towards the accused."

10. In order to prove the guilt against the appellant accused and for the purpose of proving the aspect of homicidal death, prosecution has placed reliance mainly upon the evidence of P.W.1, Dr.Akhilesh Giriraj Mishra, Ex.9, the doctor who performed post mortem on the dead body of the deceased. He has proved the post mortem note Ex.11 by way of oral evidence. He has narrated external mark of injuries in column No.17 of post mortem note and internal mark of injuries in column No.20. He has also narrated cause of death therein which has not been challenged by the other side. Not only that, all the witnesses, who are eye witnesses have also categorically deposed that the appellant accused has given axe blows on the left side neck and backside neck of the deceased and same has been proved by the concerned doctor by stating that the injuries mentioned in the post mortem note are anti-mortem and can be possible by way of muddamal axe. The doctor has also opined that it is a case of homicidal death. Same has not been objected by the learned counsel for the appellant

also. We also share the same view that death of the deceased is homicidal. Now the question comes who can be held guilty for the same.

11.In this regard, prosecution has placed reliance and examined various witnesses including prosecution witness No.3, Kalabhai Bhemabhai Ex.17. He has given detailed account of the incident. He has deposed that first they went into the forest, caught a colourful sparrow, then started the procession through each and every house of the Village and in the evening all villagers i.e. men, women, youth and children gathered in front of the house of Sada Kala Solanki where they prepared 5-6 camp fires. In para 1 of his deposition, he has categorically deposed that at that time, the appellant accused armed with axe came there and gave two axe blows on the left neck and backside of neck of the deceased when he was sitting very near to the camp fire. Thereafter, he ran away with axe. Thereafter, he along with others have taken the deceased to Ambaji hospital. As doctor was not available there, they took the deceased to Danta hospital for treatment where the doctor on examination declared him dead. He has taken part in the cremation ceremony also. He has further

deposed in para 1 that the accused is known to him by name also and he identified him in the Court by categorically stating that he is the person who has given axe blows to the deceased. When he was thoroughly cross-examined by the learned counsel for the appellant, except minor discrepancies, nothing contrary came out shaking his evidence.

12. It is established from the evidence of Kalabhai Bhemabhai that he is also a tribal person born and brought up in the same Village and knowing the appellant, the deceased as well as other villagers. As he was present throughout, question of misidentification may not arise at all. It is established from his evidence that before inflicting blows, some altercation had taken place between the accused and the deceased and, therefore also, attention of other villagers bound to have been drawn towards them and, therefore, it cannot be said that this witness has not seen the appellant accused committing murder or inflicting blows on the accused with axe. It is also established that there were 4-5 camp fire places and, therefore, sufficient light was there and hence, it cannot be said that due to darkness, the appellant could not be

identified by anyone.

13.It is true that all witnesses are tribals. However, it is required to be borne in mind that it is a Village of tribals wherein all the tribals gathered for celebrating their festival. Therefore, except the tribals, presence of other persons may not be there and would not be expected also. In view of the above, the argument of the learned counsel for the appellant that there is no independent witness to support the say of the prosecution is not required to be accepted.

14.As stated above, prosecution gets support from the evidence of other witness namely, complainant P.W.2, Bhanabhai Fulabhai Ex.14. He is also the witness of incident. He was also there along with his daughter. According to him, he was sitting very near to the camp fire place. He has fully supported the version of P.W.3, Kalabhai Bhemabhai. Not only that, at the earliest, he has filed the FIR and it has been registered with Ambaji Police Station. Said FIR has been proved by the prosecution by way of oral evidence of Investigating Officer, P.W.11, Mahendrasinh Ratnasinh Chavda, Ex.37. It may be noted that before the victim had reached Danta hospital, complaint has been registered with Ambaji Police Station first under Sec.307 IPC with

detailed account of incident along with name and act of the appellant accused and thereafter, Sec.302 of IPC was added as the deceased succumbed to the injuries and, therefore, we can safely say that at the earliest opportunity, complaint has been registered and, therefore also, version of the complainant attaches more weight. Therefore we cannot say that the complaint is concocted or registered after giving thoughtful consideration. This witness has also been thoroughly cross-examined by the learned counsel for the otherside but nothing adversely came out. He has also supported the version given by P.W.3, Kalabhai Bhemabhai.

15.There is another eye witness namely, P.W.4, Panriben Bhanabhai Ex.18. It is true that she is the sister of deceased. A suggestion was made from the side of the accused that at the time of incident, she was sitting in the house of Sada Kala Solanki along with other women. Same has been denied by her by specifically deposing on oath that she was also there and has seen the incident in question.

16.Over and above, prosecution has also placed reliance upon the evidence of one more eye witness, P.W.8, Punabhai Bhanabhai Ex.22, who is a child witness aged about 13 years. It

is required to be noted that before recording his evidence, Court has not examined his mental condition as to whether he is in a position to depose or understand the sanctity of oath or not and therefore, at the most, this can be said to be a statement of child witness and if prosecution relies only on that evidence then, it can certainly be said to be a weak piece of evidence and on that basis, accused cannot be convicted. We therefore do not give any weight to the evidence of said witness.

17. Facts however remain that all other witnesses, who claimed to be eye witnesses and who have been examined by the prosecution as eye witnesses have categorically deposed in favour of the prosecution in detail and they stuck to their version in the Court also. Thus, we accept their evidence in toto as they inspire confidence in the mind of the Court and since they are the narration of evidence of P.W.3, we are not reproducing the evidence of other evidence and we say that they have also supported the case of the prosecution. Apart from the judgment relied on by the learned APP in the case of Pulicheria Nagaraju alias Nagaraja Reddy(supra), reliance is placed on (2006)2 Supreme Court Cases (Cri) 353 in the case of

State of A.P. Vs. S.Rayappa and Others wherein it has been held by the Apex Court as under:

> “By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons.
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> 7. On the contrary it has now almost become a fashion that the public is reluctant to appear and depose before the court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed a lot. They are being threatened, intimidated and at the top of all they are subjected to lengthy cross-examination. In such a situation, the only natural witness available to the prosecution would be the relative witness. The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously.”

18. In view of the aforesaid settled law by the Apex Court, what is required to be done by the court is to evaluate cautiously the evidence of interested witnesses or relatives and if Court comes to the conclusion that their evidence are trustworthy and reliable, then, it can be relied upon for basing conviction. In this case, in addition to the evidence of P.W.3, there are evidence of P.W.2 and P.W.4 supporting the case of the prosecution.

19. The case of the prosecution is further supported by discovery panchnama Ex.40, copy of which has been produced with the paper book at running page 84. To prove the same, prosecution has examined both the panchas of said panchnama namely, P.W.6, Nathabhai Kalabhai, Ex.20 and P.W.5, Sada Kala, Ex.19. It is required to be noted that both the panchas have not supported said panchnama as well as case of the prosecution and they have been declared as hostile. Therefore, prosecution has proved the same by way of evidence of Investigating Officer, P.W.11, Mahendrasinh Ratnasinh Chavda, Ex.37 and got the panchnama exhibited as Ex.40.

20. We have gone through the evidence of I.O. and it shows that the appellant accused has voluntarily shown willingness to produce the

muddamal 'axe' alleged to have been used in the commission of offence and hidden at a place known to him alone and, therefore, panchas were called and primary panchnama was prepared in the Police Station itself. Thereafter, panchas, police personnel and accused went in a police vehicle as directed by the appellant accused and vehicle was stopped at the place as stated by the accused. The accused took them to the place inaccessible to all where muddamal was hidden and from where, he took out the muddamal in presence of panchas and it was attached under panchnama.

21. It is required to be noted that though panchas did not support the case of the prosecution or panchnama, they admitted their signatures in the panchnama and in the panch slip and, therefore, it has got some evidential value. Moreover, when said axe was sent to FSL by way of forwarding letter Ex.42, it has been opined by the FSL expert vide report Ex.33 that blood marks found on the muddamal article-F and other muddamal articles A to E are of human blood of group 'A' which is of the deceased. So, prosecution got support from the above referred evidence also.

22. In short, prosecution is able to prove the

motive as well as the presence of the appellant accused even at the time of incident along with axe apart from proving his commission of act. Not only that, after the incident also, all the witnesses have identified the appellant as the person running away from the scene of offence along with axe after committing the crime and same has been proved by the prosecution beyond reasonable doubt. We therefore do not find any reason to disbelieve the testimonies of eye witnesses though they are relatives of the deceased as they inspire confidence in the mind of the court in the view of the decisions of the Apex Court hereinabove referred to.

23. Thus, we are of the opinion that no illegality has been committed by the court below in the impugned judgment and order of conviction and sentence warranting interference by this Court in the present appeal. Hence, this appeal is required to be dismissed.

24. The appeal is dismissed.

(R.P.DHOLAKIA,J.)

(K.S.JHAVERI,J.)

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